IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 25

UNITED STATES OF AMERICA, *Petitioner,*

v.

THOMAS F. JOHNSON

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE ON BEHALF OF J. KENNETH EDLIN URGING AFFIRMANCE

This brief amicus curiae, urging affirmance of the judgment below, is filed on behalf of J. Kenneth Edlin with the consent of the Solicitor General and of counsel for the respondent Johnson.[1]

[1] The written consents have been lodged with the Clerk pursuant to Rule 42(2).

In urging affirmance of the judgment under review, the amicus fully supports the constitutional, historical and practical considerations set forth in the brief of the respondent. Those considerations, fairly viewed, compel the conclusion that Article I, Section 6, Clause 2, of the Constitution was properly applied by the court below with respect to the respondent Johnson.

The main purpose of this brief, however, is to advise the Court of the unresolved status of the appeals of two of the co-defendants in this case and of the pendency of a constitutional issue closely related to the one now under review by this Court.

Among the four co-defendants jointly indicted and tried in this proceeding were J. Kenneth Edlin and William L. Robinson, the other two being former Congressman Thomas F. Johnson and former Congressman Frank W. Boykin. Edlin, Robinson and Johnson all appealed from their judgments of conviction[2] and their appeals were consolidated and heard together by the Court of Appeals for the Fourth Circuit. 337 F. 2d 180. That court reversed the conviction of the respondent Johnson, remanding his case for a new trial on the conflict of interest charges. The court also affirmed outright the convictions of Edlin and Robinson on all counts. Thereupon two procedural steps occurred:

(1) The United States filed a petition for writ of certiorari to review that portion of the judgment below which had reversed the conviction of the respondent Johnson. That petition was granted on January 25, 1965, and the matter is now before this Court for consideration and resolution.

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[2] No appeal was taken by the co-defendant Boykin.

(2) In the meantime, timely petitions for rehearing were filed in the Court of Appeals by both Edlin and Robinson. Edlin's petition in particular emphasized the claim that the court had erred in its ruling, 337 F. 2d at 192, that

> . . . as none of the privileges of Article I, section 6 pertain to the defendants who are not members of Congress, their attack on the first count, unlike Johnson's, is not sustained.

It was pointed out in the petition that the distinction thus drawn between Congressmen and non-Congressmen, as respects the applicability of the constitutional privilege in question, was not only dubious but had not been urged by the Government nor argued by any of the parties. No opportunity had thus been afforded the appellant Edlin to bring to the court's attention the considerations and arguments that are relevant to the distinction made by the court.

Those petitions for rehearing, duly filed on October 26, 1964, have yet to be acted upon by the Court of Appeals.[3] The passage of time since the filings and the nature of the constitutional issue posed make it reasonable to conclude that the Court of Appeals is withholding action on the petitions for rehearing until this Court resolves the constitutional issue raised by the Government in the instant certiorari proceeding.

It thus becomes appropriate to advise this Court briefly as to the nature of the constitutional question as yet not finally resolved by the Court of Appeals, a question that is intimately related to the one now before this Court. In so doing, however, the amicus does

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[3] The petition of the appellant Edlin sought in the alternative a rehearing by the original panel or a rehearing by the court en banc.

not intend to press these contentions upon this Court at this time or to ask that the related issue be resolved. On the contrary, the amicus is anxious that the issue not be resolved at this time, either by direction or indirection, so that the Court of Appeals may fully assess the issue in the light of the forthcoming decision of this Court with respect to the availability of the constitutional privilege, under the circumstances, to a Congressman.

The unresolved contentions of the amicus which are thought to make it proper in this instance to extend the constitutional privilege to these particular non-Congressmen, as set forth in the petition for rehearing below, may be summarized as follows:

(1) Article I, Section 6, Clause 2, of the Constitution states that "for any Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other Place." Thus, while this provision is frequently spoken of as providing a "privilege" or "immunity" for Congressmen, it actually puts its emphasis on forbidding the *questioning* of Congressmen outside their respective Houses. The provision plainly means that such questioning is forbidden under any circumstances outside of Congress.

(2) In order that the full, liberal design of this constitutional language may be given effect, this provision would appear applicable, in the words of the court below (337 F. 2d at 188), "whenever the motivation for making a speech is called into question"—be the occasion a criminal or a civil proceeding. And if such motivation is called into question, it becomes immaterial whether the Congressman is a formal defendant in the court proceeding. The Constitution does not speak

of an inquiry or questioning only where a Congressman is a formal party to a proceeding; it prohibits broadly and without limitation any questioning and any inquiry into the Congressman's motives in making a speech in Congress. Thus when such questioning and inquiry become central to a criminal charge or conviction of any person—be he a Congressman or a non-Congressman—the plain language and the public policy of the constitutional provision would appear applicable.

(3) The problem thus raised is not merely one in terms of the applicability or scope of the constitutional prohibition. It is also a problem as to the jurisdiction of the court before which a criminal or civil proceeding is pending. As the court below ruled, 337 F. 2d at 191, "the privilege being applicable, courts are barred from exercising jurisdiction" over the case. And if that be true, a court would have no jurisdiction to hear or decide a civil or criminal charge against *any* person if the complaint or indictment necessarily calls for an inquiry into, or a questioning of, a Congressman's motives for making a speech. See *Ex parte Wason,* 4 Q.B. 573 (1869), where a conspiracy indictment against both members and non-members of Parliament was dismissed since the motives of the members were necessarily put in issue.

(4) The central issue accordingly becomes one of determining whether the charge that the appellant Edlin conspired with others to pay Congressman Johnson to deliver a speech in the House of Representatives so necessarily involves a questioning or inquiry of the Congressman's motives as to fall beyond the jurisdiction of the District Court in this proceeding. If, in the course of proving such a conspiracy charge, it be-

comes essential to inquire into and evaluate the Congressman's motives, then the constitutional prohibition would operate to bar both the inquiry and the prosecution. As in the *Wason* case, the alleged conspiracy would not be "an indictable offense" within federal jurisdiction.

(5) So stating the issue, the appellant Edlin contends that the conspiracy count as to him was as constitutionally defective as it was relative to Congressman Johnson. To convict Edlin, it was necessary, to use the lower court's language (337 F. 2d at 189), to launch "an inquiry into Johnson's reason for delivering the speech, the very inquiry which the Supreme Court has explicitly declared to be beyond a court's power." There is, as the opinion below amply demonstrates, a complete identity between the forbidden evidence used to convict Johnson and that used to convict Edlin and Robinson. The very same inquiry, the very same evidence as to Johnson's motives, underlay the whole conspiracy charge and the conviction of the non-Congressmen.

(6) Thus the questioning of the Congressman, made necessary to secure the conviction of all the co-conspirators, called forth the constitutional prohibition with respect to the entire prosecution. And the resulting proscription of the conspiracy charge as to Edlin is fully consonant with the public policy underlying the constitutional provision in question. That policy was recognized by the court below to be one of promoting the independence of all Congressmen in the fulfillment of their public trust by avoiding restraint on free expression on the floor of either House. 337 F. 2d at 189, 191. The hazard or threat of criminal or civil inquiry into the good faith of legislative speech "may in

itself be so devastating that an innocent congressman may well fear it." 337 F. 2d at 191.

The devastating effect of potential inquiry is no less evident, however, where the inquiry takes place in a criminal or civil proceeding to which the Congressman is not a party. Can it be denied that free expression is inhibited by the threat of inquiring into a Congressman's motives in the course of a court action involving only his wife, his administrative assistant, a constituent, a friend—or even a stranger? Is the evil of inhibition any less meaningful because the Congressman himself is not a party to the proceeding or because he is not a named co-defendant? Might he not be compelled, at the pain of inhibiting his freedom of expression, to obey his conscience or a court subpoena to defend and explain his motives in this type of proceeding? Indeed, how can a non-legislative defendant adequately defend himself against the kind of conspiracy indictment here involved without calling the Congressman as a witness to explain and defend his motives in making the speech? And if such a defendant called the Congressman as a witness, could the latter be compelled to answer questions as to his motives?

These are but a few of the many questions inherent in the fact that a Congressman does not operate in a vacuum, unmindful of the possibility of others being charged with unduly influencing or perverting his actions and words on the floor of Congress. Unless he is protected against inquiries as to his motives in such circumstances, the evil which the constitutional provision was designed to preclude may well ensue. And the constitutional provision would soon lose the liberality of its intended scope.

In sum, Article I, Section 6, Clause 2, of the Constitution "nullifies sophisticated as well as simple-minded modes" (cf. *Lane* v. *Wilson*, 307 U.S. 268, 275) of questioning a Congressman for having delivered a speech in the House or Senate. To instill effective meaning into this provision, the questioning must be banned wherever it arises in any court action; and any complaint or indictment which is necessarily premised upon such questioning must be considered beyond the jurisdictional ken of courts.

Such, then, is the nature of the constitutional question posed by the amicus in his unresolved petition for rehearing in the Court of Appeals. There are, of course, other questions raised in that petition, such as (a) whether the use of the constitutionally impermissible evidence prejudiced Edlin's right to the unbiased consideration of the jury on the remaining counts, a prejudice found to exist with respect to Johnson; (b) whether Edlin can properly be convicted as an aider and abettor of violations of 18 U.S.C. § 281 where the conviction of Johnson, the principal and the only one could have committed the substantive crime, has been vacated; (c) whether Edlin, as an alleged payer of compensation to a Congressman, can be charged with aiding and abetting a violation of 18 U.S.C. § 281; and (d) whether the totality of prejudice arising from the repeated admission of testimony concerning Edlin's character and past criminal record was so great as to warrant reversal.

As indicated, these various contentions are set forth here so that this Court may be aware of their existence and pendency before the Court of Appeals. They involve considerations that have not been fully briefed or argued by either the Government or counsel for the

amicus. And in the event that this Court affirms the judgment below, as the amicus here urges, these matters will then be ripe for full consideration by counsel and by the court below.

Respectfully submitted,

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